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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 699

CAPITOL MEATS, INC., MARK SLOTKIN, ALSO KNOWN AS MORRIS SLOTKIN, LOUIS GERBER AND MAX REINGOLD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 171-174) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 1, 1948 (R. 175). The petition for a writ of certiorari was filed March 27, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether, in a prosecution for making sales at over-ceiling prices, where the sole question at issue was whether petitioners demanded and received more than the ceiling price, the judge's omission to charge on wilfulness constituted prejudicial error requiring reversal of the convictions, despite the fact that petitioners' counsel specifically acquiesced in the charge.

STATUTE INVOLVED

The Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664 (50 U.S.C. App., Supp. V, Section 901, *et seq.*) provides in pertinent part:

> Sec. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *
>
> * * *
>
> Sec. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2. * * *.
>
> Sec. 205 (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

STATEMENT

An information in 24 counts was returned against petitioners in the United States District Court for the Eastern District of New York charging in each count a separate sale of meat at over-ceiling prices (R. 8-21). The corporate petitioner was found guilty on fifteen counts and fined $1,000 on each of them (R. 157, 162). The individual petitioners, who are officers of the corporate petitioner (R. 121), were convicted on various counts (R. 158-159). Each was sentenced to imprisonment for 30 days on one count; sentences were suspended on the other counts, and petitioners were placed on probation for one year (R. 162-163). On appeal, the judgments were affirmed (R. 175).

Various witnesses testified for the Government that they purchased beef and liver at wholesale from the corporate petitioner acting through one of the individual petitioners; that they received invoices at ceiling prices but actually paid in cash amounts above the ceilings (R. 58-69, 76-77, 86-89, 110-112). The individual petitioners took the stand and testified that they collected only the ceiling prices (R. 123, 135-136, 137.)

In submitting the case to the jury, the trial judge told them that Congress had enacted the Emergency Price Control Act, and that pursuant to the act, rules and regulations had been promulgated which fixed ceiling prices on certain commodities, including beef and liver, the products which petitioners were charged with having sold in violation of the regulations. The judge said (R. 152-153):

> • • • Those price ceilings affected these defendants, and to obey the law they were required to keep within the price ceilings, not to sell any commodity therein referred to beyond the ceiling prices. The Government contends that in these counts that remain for your consideration these defendants did violate

> the Act by selling over the price ceilings, and that is the reason they are here on trial in this case.

The judge briefly summarized the testimony of the government witnesses that they paid amounts above the ceiling prices recorded on the invoices, and the testimony of petitioners denying that they received additional cash (R. 154-155). He then said (R. 155):

> • • • It is for you to determine which group of witnesses you believe and under the rules of evidence which I have outlined determine the guilt or innocence of these defendants.

At the conclusion of the instructions, counsel for petitioners specifically stated that he had no requests to charge and no exceptions (R. 155-156).

ARGUMENT

Petitioners' sole contention is that the judge's failure to tell the jury that, in order to convict, they must find that the violations of the price regulations were wilful, rendered the charge so incomplete in the definition of the offense that the appellate court was under a duty to reverse the convictions, despite the fact that their counsel neither offered additional instructions nor excepted to the charge.

However, as the court below held (R. 172-173), under the particular circumstances of this case the omission to charge on wilfulness was at most a formal defect which did not affect petitioners' substantial rights. The only issue in the case was whether petitioners did or did not demand and receive cash payments above the prices appearing on the invoices. Admittedly, the invoice prices were the ceiling prices (R. 125), and, admittedly, the individual petitioners personally collected bills from one or more of the witnesses who testified for the Government (R. 122, 124, 135, 137, 139). There was no claim by petitioners that they did not

know the ceiling prices, or that they inadvertently charged more than the ceiling prices. Their only claim was that they did not receive any sums above the invoice prices. When, therefore, the jury, under the judge's instructions, had to find, in order to convict, that petitioners did demand and receive cash above the invoice prices, the jury necessarily found that petitioners knowingly, i.e., wilfully, demanded and received money above the ceiling price. Under the facts of this case, therefore, the jury in following the judge's charge had to find all elements of the offense in order to convict.

Rule 30 of the Federal Rules of Criminal Procedure specifically provides that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." While Rule 52(b) does empower an appellate court to notice "plain errors or defects affecting substantial rights," the error in this case, is, as we have shown, not one "affecting substantial rights." Having specifically approved the trial judge's instructions, which adequately put before the jury the only real issue in the case, petitioners are not now in a position to complain of that which they earlier approved. See *Johnson* v. *United States*, 318 U. S. 189, 199-201; *Chereton* v. *United States*, 161 F. 2d 808, 809 (C.C.A. 6), certiorari denied, 332 U. S. 765.[1]

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[1] No real conflict is involved between the opinion below and the decisions cited in the opinion (R. 173), which hold that a judge's failure to explain the pertinent provisions of the governing statute constitutes prejudicial error. The judge did describe the requirements of the regulation in simple language. See pp. 3-4, *supra*. As the Circuit Court of Appeals for the Ninth Circuit held in *Wilton* v. *United States*, 156 F. 2d 433, 436, decided the day after its decision in *Morris* v. *United States*, 156 F. 2d 525, one of the cases laying down the aforementioned rule, "It is not required that a judge define the offense in the language of the statute, but only that he adequately state its essentials."

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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